No. 06-637

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,
Petitioner,

v.

TOM F., on behalf of GILBERT F., a minor child,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE INTERNATIONAL DYSLEXIA ASSOCIATION, INC. (IDA), THE NEW YORK BRANCH OF THE IDA, NAMI, MENTAL HEALTH AMERICA, AND THE BAZELON CENTER, IN SUPPORT OF RESPONDENT

PAUL M. SMITH*
HARRY SANDICK
SANDI J. TOLL
JESSICA RING AMUNSON
BRADLEY A. AREHEART
JENNER & BLOCK LLP
601 Thirteenth Street, NW
Washington, DC 20005
(202) 639-6000

* Counsel of Record

July 18, 2007

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Private School Tuition Reimbursement May Be Ordered Under The IDEA Even If The Child Has Not First Been Placed In A Public School Setting. 5

A. The Court Has Recognized Parents' Right To Seek Tuition Reimbursement. 6

B. Petitioner's "Fail First" Rule Is Not Consistent With The IDEA. 8

C. The Petitioner's Proposed Rule Is Inconsistent With The IDEA's Emphasis On Early Intervention. 11

D. Petitioner's Rule Is Also Strongly In Tension With The National Commitment, Embodied In The IDEA, To Effective Literacy Education. 13

II. The Empirical Research Demonstrates That Placing Children With Disabilities Appropriately From The Beginning Is Critical. 17

A. Effective Literacy Training At An Early Stage Is Critical. 17

B. Educators Understand The Costs Of Mistakes In Initial Placements. 19

C. The Costs of Petitioner's Rule Will Far Outweigh The Costs Of Allowing Parents To Choose An Appropriate Private Setting For A Child Entering The Educational System, Where Necessary. 22

1. The individual costs to the child of failing to provide an appropriate initial placement are high. 23

BEST AVAILABLE COPY

2. The societal costs of failing to provide an appropriate initial placement are high. 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Diatta v. District of Columbia, 319 F. Supp. 2d 57 (D.D.C. 2004) 27

Florence County School District v. Carter ex rel. Carter, 510 U.S. 7 (1993) 6, 7, 8, 22

Frank G. v. Board of Education of Hyde Park, 459 F.3d 356 (2d Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3248 (U.S. Oct. 23, 2006) (No. 06-580) 3, 4

School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359 (1985) 3, 4, 6, 7, 8, 9, 11

SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943) 6

Winkelman ex rel. Winkelman v. Parma City School District, 127 S. Ct. 1994 (2007) 6

STATUTES

20 U.S.C. § 1400(d)(1) 3, 6

20 U.S.C. § 1400(d)(2) 11

20 U.S.C. § 1412(a)(3) 10

20 U.S.C. § 1412(a)(6) 10

20 U.S.C. § 1412(a)(9) 10

20 U.S.C. § 1412(a)(10)(C)(i) 9

20 U.S.C. § 1412(a)(10)(C)(ii) 8, 9, 10, 13

20 U.S.C. § 1415(i)(2) 6

20 U.S.C. § 1415(i)(2)(C)(iii) 3

20 U.S.C. § 1415(j) 10

20 U.S.C. § 1431(a) 11, 22

20 U.S.C. § 1450(11) 11

LEGISLATIVE MATERIALS

143 CONG. REC. S4401-04 (daily ed. May 14, 1997) 12

147 CONG. REC. H906-05 (daily ed. March 14, 2001) 23

H.R. REP. No. 105-95 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78 ..... 12, 22

S. REP. NO. 105-17 (1997) 12, 13

Statement by President George W. Bush Upon Signing H.R. 1350, 2004 U.S.C.C.A.N. S43, (Dec. 3, 2004) 15, 16

Learning Disabilities and Early Intervention Strategies: How to Reform the Special Education Referral and Identification Process: Hearing Before the H. Subcomm. on Educ. Reform of the H. Comm. of Educ. and the Workforce, 107th Cong. (2002) 25, 26, 28

MISCELLANEOUS

American Psychiatric Ass'n, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV-TR (4th ed. 2000) 14, 28

Stanley J. Antonoff, *Juvenile Justice, Dyslexia, and Other Learning Disabilities*, *in* THE SECOND CONFERENCE ON JUVENILE JUSTICE, DYSLEXIA AND OTHER LEARNING DISABILITIES (Stanley J. Antonoff ed., 2000) 28, 29

Sue Burrell & Loren Warboys, Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *Special Education and the Juvenile Justice System* (2000), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/179359.pdf 29

Committee on Integrating the Science of Early Childhood Development, FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT (Jack P. Shonkoff & Deborah A. Phillips eds., 2000) 18, 19

Deborah Dewey, *Comorbidity of Developmental Disorders*, *at* http://play.psych.mun.ca/~dhart/clinical/newsletter/comorbidity.htm (last visited July 17, 2007) 26

Sheldon H. Horowitz, National Center for Learning Disabilities, *Transition to Kindergarten: Policy Implications for Struggling Learners and Those Who May Be at Risk for Learning Disabilities* (2007), *available at* http://www.ncld.org/images/studies/downloads/school-transition-policy-paper.pdf (last visited July 4, 2007) 18

Joseph R. Jenkins & Rollanda E. O'Connor, *Early Identification and Intervention for Young Children with Reading/Learning Disabilities*, *in* LEARNING DISABILITIES SUMMIT: BUILDING A FOUNDATION FOR THE FUTURE (Aug. 2001), *available at* http://www.nrcld.org/resources/ldsummit/Jenkins.shtml (last visited July 2, 2007) 17

LD Online, *What is a Learning Disability, available at* http://www.ldonline.org/ldbasics/whatisld (last visited July 13, 2007) 14

Learning First Alliance, *Every Child Reading: An Action Plan of the LEARNING FIRST ALLIANCE* (1998), *available at* http://www.learningfirst.org/publications/reading (last visited July 1, 2007) 24

G. Reid Lyon & Jack M. Fletcher, Hoover Inst., *How to Prevent Reading Disabilities* (2001), *available at* http://www.hoover.org/publications/ednext/3389276.html (last visited July 3, 2007) 19

National Council on Disability, *Addressing the Needs of Youth with Disabilities in the Juvenile Justice System: The Current Status of Evidence-Based Research* (May 1, 2003), *available at* http://www.ncd.gov/newsroom/publications/pdf/juvenille.pdf 28, 29

National Council on Disability, *The Well Being of Our Nation: An Inter-Generational Vision of Effective Mental Health Services and Supports* (Sept. 16, 2002), *available at* http://www.ncd.gov/newsroom/publications/2002/pdf/mentalhealth.pdf 28, 29

National Reading Panel, *Teaching Children to Read: An Evidence-Based Assessment of the Scientific Research Literature on Reading and Its Implications for Reading Instruction* (2000) 20

National Research Council, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN (Catherine E. Snow et al. eds., 1998) 15, 18, 19, 20, 21, 24, 25

National Research Council, STARTING OUT RIGHT: A GUIDE TO PROMOTING CHILDREN'S READING SUCCESSES (1999) 20

Patricia N. Pastor et al., National Center for Health Statistics, Centers for Disease Control and Prevention, *Parental Reports of Emotional or Behavioral Difficulties and Mental Health Service Use Among U.S. School-Age Children*, *available at* http://mentalhealth.samhsa.gov/publications/allpubs/SMA06-4195/Chapter18.asp (last visited July 13, 2007) 13, 14

Michael Regalado et al., Building Community Systems for Young Children, *Reading and Early Literacy* (2001) 15

L. Bill Searcy, *Preventing Reading Difficulties Through Early Identification of Children with Special Literacy Needs*, *in* PEER PROJECT (2000) 20, 21

Sally Shaywitz, OVERCOMING DYSLEXIA: A NEW AND COMPLETE SCIENCE-BASED PROGRAM FOR READING PROBLEMS AT ANY LEVEL (2003) 14, 17

Marcee M. Steele, *Making the Case for Early Identification and Intervention for Young Children at Risk for Learning Disabilities*, 32 EARLY CHILDHOOD EDUC. J. 75 (2004) 17-18, 19

Robert W. Sweet, Jr., *The Big Picture: Where We Are Nationally on the Reading Front and How We Got Here, in* VOICE OF EVIDENCE IN READING RESEARCH (Peggy McCardle & Vinita Chhabra, eds., 2004) 15

Joseph K. Torgesen, *Catch Them Before They Fall: Identification and Assessment to Prevent Reading Failure in Young Children* (1998), *available at* http://www.ldonline.org/article/225?theme=print (last visited June 30, 2007) 21, 23, 24

Joseph K. Torgesen, *Lessons Learned from Research on Intervention for Students Who Have Difficulty Learning to Read, in* VOICE OF EVIDENCE IN READING RESEARCH (Peggy McCardle & Vinita Chhabra, eds., 2004) 20

Joseph K. Torgesen, *Preventing Early Reading Failure—and its Devastating Downward Spiral: The Evidence for Early Intervention*, AMERICAN EDUCATOR (Fall 2004), *at* http://www.aft.org/pubs-reports/american_educator/issues/fall04/reading.htm (last visited July 17, 2007) 24

U.S. Dep't of Educ., *Executive Summary of the No Child Left Behind Act of 2001, available at* http://www.ed.gov/nclb/overview/intro/execsumm.html (last visited July 2, 2007) 15

U.S. Dep't of Educ., *Twenty-First Annual Report to Congress on the Implementation of the Individuals with Disabilities Act* (1999), *available at* http://www.ed.gov/nclb/overview/intro/execsumm.html (last visited July 2, 2007) 29

University of Michigan Health Systems, *What are Learning Disabilities (LD)?*, *at* http://www.med.umich.edu/1libr/yourchild/ld.htm (last visited July 17, 2007) 26

Mary Wagner et al., *Educating Students with Emotional Disturbances: A National Perspective on School Programs and Services*, 14 J. OF EMOTIONAL & BEHAVIORAL DISORDERS 12 (2006) 21

Jeanette Wasserstein & Martha Denkla , *Learning Disabilities and Attention Deficit/ Hyperactivity Disorder in Adults: Overlap with Executive Functioning in* ATTENTION-DEFICIT DISORDERS AND COMORBIDITIES IN CHILDREN, ADOLESCENTS, AND ADULTS (Thomas Brown ed., forthcoming 2008) 26

INTEREST OF *AMICI CURIAE*

The International Dyslexia Association, Inc., the New York Branch of the International Dyslexia Association, Inc., NAMI (the National Alliance on Mental Illness), Mental Health America, and the Bazelon Center for Mental Health Law respectfully submit this brief as *amici curiae* in support of Respondent. The parties have consented to the filing of this brief.[1]

The International Dyslexia Association (IDA) is the oldest learning disabilities organization in the nation dedicated to helping individuals with dyslexia, their families and the communities that support them. IDA works to meet the organization's mission of providing education, research and advocacy through its 47 branches across the U.S. and Canada and in conjunction with its Global Partners throughout the world. Its goal is to provide a comprehensive forum for parents, educators, and researchers to share experiences, methods, and knowledge. It is also an active advocacy group in matters of public policy or legal concern.

The New York Branch of the International Dyslexia Association (NYB-IDA) is a nonprofit organization that provides public information, referrals, training and support to professionals, families and affected individuals regarding the impact and treatment of people with dyslexia and related learning disorders. It actively advocates for and engages in public educational efforts to promote the teaching of reading through structured multisensory, research-based instruction. Its members are actively engaged in special educational services, including targeted educational intervention and the provision of reasonable accommodations for students with

---

[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel contributed monetarily to this brief.

disabilities at all levels of education and in high-stakes standardized testing.

NAMI (the National Alliance on Mental Illness) is the nation's largest grassroots mental health organization dedicated to improving the lives of children and adults living with mental illnesses and their families. NAMI is a national organization with affiliate organizations in every state and in over 1100 local communities across the country. NAMI works to meet the organization's mission through advocacy, research, support, and education. NAMI advocates for broader school compliance with all of the provisions included in the Individuals with Disabilities Education Act and enforcement of federal special education law to improve the academic and functional performance of students with mental illnesses and related disabilities.

Mental Health America (MHA), formerly the National Mental Health Association, is the country's oldest and largest nonprofit mental health organization. MHA has over 320 affiliates who are dedicated to improving the mental health of all Americans, especially the 54 million people who have severe mental disorders. Through advocacy, education, research, and service, MHA helps to ensure that children with emotional disturbances and adults with mental illnesses are accorded respect, dignity, and the opportunity to achieve their full potential.

The Bazelon Center is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, policy and administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. An important part of the Center's work involves efforts to remedy disability-based discrimination through enforcement of the Individuals with Disabilities Education Act.

SUMMARY OF ARGUMENT

The primary purpose of the Individuals with Disabilities Education Act ("IDEA" or "the Act") is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs [and] to . . . ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1). The goal of a free and appropriate public education ("FAPE") is accomplished under the IDEA through a system in which each child with a disability is entitled to have an individualized education plan ("IEP") that is tailored to address his or her particular circumstances. *See School Comm. of the Town of Burlington v. Dep't of Educ.* ("*Burlington*"), 471 U.S. 359, 368 (1985) (describing an IEP as "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs"). If a school district does not provide FAPE to a child, then the parent is entitled to remove the child from his or her public school and enroll the child in a private school that is able to provide an appropriate education, with the right to seek tuition reimbursement from the school district. *Id.* at 369-70.

In this case, the United States Court of Appeals for the Second Circuit correctly concluded that the central purpose of the IDEA—to provide FAPE to all children with disabilities—is best served by "conferring broad discretion on the district court to grant relief [as] it deems appropriate to parents of disabled children who opt for a unilateral private placement in cases where the parents' placement is determined to be proper and the proposed IEP is determined to be inadequate." *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 371 (2d Cir. 2006) (citing 20 U.S.C. § 1415(i)(2)(C)(iii)), *petition for cert. filed*, 75 U.S.L.W.

3248 (U.S. Oct. 23, 2006) (No. 06-580). Petitioner urged the Second Circuit (as it now urges this Court) to strip district courts of this discretion and to mandate instead that courts condition reimbursement under the IDEA on the child having first given the school district's proposed placement a "try," despite its inappropriateness. Pet'r Br. at 22. Petitioner offers no indication of how long this "try" must last before a child's parents can determine that the placement has failed—an hour, a day, a semester, a year, or even the several years it sometimes takes for exhaustion of the administrative and judicial review process and for the IEP to be declared inadequate. *See Burlington*, 471 U.S. at 361 (describing length of time it takes to review an IEP). But whatever the required length of the "try" envisioned by Petitioner, the IDEA does not, in fact, force parents to make a choice between placing their child in an environment that does not meet that child's needs and forgoing their right to have the public school system pay for an appropriate education.

The Second Circuit properly rejected Petitioner's proposed rule because it would place parents in the "untenable position of acquiescing to an inappropriate placement in order to preserve their right to seek reimbursement from the public agency that devised the inappropriate placement." *Frank G.*, 459 F.3d at 372. The proposed rule also would produce the "absurd result[]" that parents of children whose disabilities are detected early, before the children reach school age, and who receive an inadequate IEP, must nonetheless place their children in public school, knowing that their children will likely fail in that environment, or else forfeit their children's right to a *free* appropriate public education. *See id.* But as the statutory language, legislative history, and this Court's precedents all make clear, "[s]uch a 'first bite' at failure is not required by the IDEA." *Id.*

The adoption of the "fail first" policy advocated by Petitioner would have disastrous consequences for some children with disabilities. Reading skills need to be taught in a child's earliest years, and effective early instruction is often required for a child with a learning disability to learn how to read. Children with mental and emotional disabilities likewise need effective intervention at the earliest possible stage of their development. If children must first endure an inappropriate placement before they can receive the intensive and direct instructional assistance they may require, then there will be children who could learn to read, but do not. This deficiency not only directly harms these children, who inevitably will struggle with failing in school, but also yields societal costs that stem from an increased likelihood that these children will drop out of school and/or end up in the juvenile justice system. Congress enacted the IDEA to prevent these harms, all of which will flow from a decision to adopt Petitioner's rule.

For all of these reasons, this Court should affirm the decision of the United States Court of Appeals for the Second Circuit.

ARGUMENT

I. Private School Tuition Reimbursement May Be Ordered Under The IDEA Even If The Child Has Not First Been Placed In A Public School Setting.

Petitioner is arguing in this case that every child, regardless of the child's circumstances and regardless of the inadequacy of the services offered by the local public school system, *must* be placed in that offered program or forfeit his or her right to a free and appropriation education. In effect, Petitioner asks this Court to impose a "fail first" rule, requiring that children first spend time in a proposed public school placement, even where parents strongly recognize that their children will fail in that placement. That interpretation

of the statute makes little sense in light of the language, structure, and policies of the Act.

A. The Court Has Recognized Parents' Right To Seek Tuition Reimbursement.

In *Burlington*, 471 U.S. at 370, and *Florence County School District v. Carter ex. rel Carter*, 510 U.S. 7 (1993), this Court held that the IDEA empowers courts to order tuition reimbursement as relief for parents who placed their children in private school contrary to an IEP if the court determined that the school district's proposed placement was inadequate and that the private placement was adequate.[2] That interpretation advanced the central purpose of the IDEA, which, like all statutes, must be construed "in conformity with its dominating general purpose" and needs to be read "in the light of context . . . so as to carry out in particular cases the generally expressed legislative policy." *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943). The "dominating general purpose" of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education" and also to "ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1); *see Winkelman ex rel. Winkelman v. Parma City School Dist.*, 127 S. Ct. 1994, 2000 (2007); *Carter*, 510 U.S. at 14. And the IDEA promises that children with disabilities can learn in an environment that "meet[s] their unique needs." 20 U.S.C. § 1400(d)(1).

---

[2] *Burlington* and *Carter* relied upon Title 20, United States Code, Section 1415(i)(2), which provides that any party "aggrieved by the findings and decision" rendered in administrative proceedings "shall have the right to bring a civil action with respect to the complaint presented pursuant to this section . . . in any State court of competent jurisdiction or in a district court of the United States . . . ." 20 U.S.C. § 1415(i)(2). The provision further states that the court "shall grant such relief as the court determines is appropriate." *Id.*

Getting children into such an environment at the earliest possible stage of their development is critical to realizing the purpose of the IDEA. As the Court recognized in *Burlington*, time is of the essence in ensuring that children with disabilities receive the services they need. Often, "review of a contested IEP takes years to run its course," which is especially problematic because these are "years critical to the child's development." *Burlington*, 471 U.S. at 361. During these years, parents who disagree with the school district's proposed IEP can either "go along with the IEP to the detriment of their child if it turns out to be inappropriate, or pay for what they consider to be the appropriate placement." *Id.* at 370.[3] The Court in *Burlington* held that if parents choose the latter course, and if they are correct that the IEP was inappropriate and the private school placement turns out to be appropriate, they can be reimbursed for their choice. *See id.* at 372. Indeed, any other result "would be contrary to IDEA's guarantee of 'free appropriate public education.'" *Carter*, 510 U.S. at 12.

But at the same time, as this Court emphasized in *Carter*, parents who choose unilaterally to place their children in private school "'do so at their own financial risk.'" 510 U.S. at 15 (quoting *Burlington*, 471 U.S. at 373-74). They are entitled to reimbursement only if "a federal court concludes *both* that the public placement violated IDEA *and* that the private school placement was proper under the Act." *Id.* (emphasis added). Even then, reimbursement is not guaranteed. Rather, courts "must consider all relevant factors" and "[t]otal reimbursement will not be appropriate if

[3] *Amici* do not mean to suggest, however, that a parent *must* keep a child in a placement in which he or she is failing for years.

the court determines that the cost of the private education was unreasonable."[4] *Id.* at 16.

B. Petitioner's "Fail First" Rule Is Not Consistent With The IDEA.

Seeking to cut back on the rights recognized in *Burlington* and *Carter*, and largely ignoring the overall purposes of the Act, Petitioner argues that Section 1412(a)(10)(C)(ii), a provision added to the IDEA in 1997, "creates a threshold requirement" that "the parent first give the public school's placement a try" in order to keep his or her children eligible for tuition reimbursement under the IDEA.[5] Pet'r Br. at 22. Under this "fail first" rule, many parents could no longer choose to put their family's finances at risk for the sake of their child even when they are "reasonably confident" that a court will later prove them right that the IEP was inadequate. *Burlington*, 471 U.S. at 370. Instead, Petitioner gives them a new choice: forgo your child's right to a *free* appropriate public education, or forgo your child's right to a free *appropriate* public education. Parents with substantial means will undoubtedly choose the former, while parents with lesser means will undoubtedly

---

[4] Given that courts must explicitly consider equitable factors in deciding whether reimbursement relief is warranted, the repeated (and unsupported) complaints from Petitioner's *amici* that the Second Circuit's rule will result in parents gaming the public school system are utterly unjustified. *See, e.g.*, Br. of the Council of the Great City Schools et al., at 24-27; Br. of Nat'l School Boards Ass'n et al., at 24-28.

[5] This provision provides that "[i]f the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a [FAPE] available to the child in a timely manner to that enrollment." 20 U.S.C. § 1412(a)(10)(C)(ii).

choose the latter. But the reality is that this is no choice at all, and certainly not a choice that the IDEA contemplated or one that can be reconciled with this Court's prior cases. *See id.* at 372 ("The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.").

The usual tools of statutory interpretation do not support such a counterintuitive reading. To begin with, while the statutory language authorizes tuition reimbursement for parents who unilaterally place in a private setting a child "who previously received special education and related services under the authority of a public agency," 20 U.S.C. § 1412(a)(10)(C)(ii), it does not say that parents are barred from seeking reimbursement when the child has not previously attended a public school. Moreover, such a reading would be in tension with the test that Congress repeatedly set out for determining whether parents should be reimbursed—*i.e.*, whether the public schools had made a free and appropriate public education *available*. First, in Section 1412(a)(10)(C)(i), Congress addressed the situations in which public schools need *not* pay tuition reimbursement, stating that they are protected "if that agency made a free appropriate public education available to the child." Then, in 1412(a)(10)(C)(ii), the section at issue here, Congress reiterated that the issue is not the services actually provided to the child in a pervious public setting but whether "the agency had . . . made a free appropriate public education available to the child in a timely manner prior to [the private school] enrollment." It makes little sense to argue that Congress was limiting reimbursement to children previously placed in public schools, while simultaneously conditioning that right on what was made available (even if never tried).

Moreover, Petitioner asks this Court to read Section 1412(a)(10)(C)(ii) in a way that is divorced entirely from that its surrounding context. To begin with, as *amici* make clear *infra*, Petitioner's interpretation would impede achievement of the Act's central goal, which is to provide a free and appropriate education to every child, including those who have not yet started school.

In addition, Petitioner's reading of this subsection makes no sense in light of the other parts of the same statutory section. Section 1412 elsewhere contains what is commonly referred to as the "child find" provision of the IDEA. This provision requires States to implement policies and procedures to ensure that "[a]ll children with disabilities . . . who are in need of special education and related services, are identified, located, and evaluated." 20 U.S.C. § 1412(a)(3). It also mandates that States ensure that "[c]hildren participating in early-intervention programs . . . experience a smooth and effective transition" to school. *Id.* § 1412(a)(9). Section 1412 further guarantees children procedural safeguards, *see id.* § 1412(a)(6), such as the "stay put" provision of the IDEA, which allows children to stay in their current educational placements while the appropriateness of a new placement is being adjudicated, *see id.* § 1415(j).

Petitioner's reading of Section 1412(a)(10)(C)(ii) would undercut the meaning of these other parts of Section 1412. The "child find" provision is meant to ensure that a child receives appropriate services as quickly as possible. Yet Petitioner's reading would undoubtedly result in unacceptable delays before some children are able to receive the services they need. Moreover, Petitioner's rule undermines the "stay put" provision, which is designed to create stability and continuity for children with disabilities. This stability and continuity will inevitably be disrupted by

forcing parents to enroll their children, even if briefly, in public school to remain eligible for tuition reimbursement.

In short, the Court should reject Petitioner's proposed rule because it conflicts with *Burlington* and looks past the dominant purpose of the IDEA. It would also weaken specific provisions of the IDEA that concern the identification and diagnosis of children with mental, emotional, and learning disabilities and the need for these children to receive a proper placement during the time-consuming process of IDEA litigation. *See Burlington*, 471 U.S. at 370 (describing the review process under the IDEA as "ponderous" and taking as long as "several years").

C. The Petitioner's Proposed Rule Is Inconsistent With The IDEA's Emphasis On Early Intervention.

Apart from its incompatibility with the general statutory purpose behind the IDEA, Petitioner's rule also would undercut the purpose of the 1997 amendments to the IDEA, which were intended to improve early intervention services. The IDEA recognizes, in several different ways, that no time can be lost when providing services to children with disabilities. *See, e.g.*, 20 U.S.C. § 1400(d)(2) (noting that one of the purposes of the Act is to "assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services"); *id.* § 1431(a)(1) (finding that there is an "urgent and substantial need to enhance the development of infants and toddlers with disabilities, to minimize their potential for developmental delay, and to recognize the significant brain development that occurs during a child's first 3 years of life"); *id.* § 1450(11) (finding that "training and information activities assist parents of a child with a disability in dealing with the multiple pressures of parenting such a child and are of particular importance in . . . ensuring the involvement of parents in planning and decisionmaking with respect to early

intervention . . . [and] achieving high quality early intervention, educational, and transitional results for children with disabilities").

In enacting the 1997 amendments to the IDEA, Congress recognized that the early years are the most critical years in serving children with disabilities. *See, e.g.*, H.R. REP. NO. 105-95, at 115 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 113 ("The Committee continues to recognize the importance of early intervention. . . ."); S. REP. NO. 105-17, at 17 (1997) (same). Legislative history reveals that a primary purpose of the 1997 amendments was to provide states with "greater flexibility" to address the needs of children "at risk of having substantial developmental delays if they do not receive early intervention services." H.R. REP. NO. 105-95, at 115, *as reprinted in* 1997 U.S.C.C.A.N. 113. As further described in the House Committee Report, one of the goals of the 1997 amendments was to "[p]romote improved educational results for children with disabilities through early intervention, preschool, and educational experiences that prepare them for later educational challenges and employment." H.R. REP. NO. 105-95, at 82, *as reprinted in* 1997 U.S.C.C.A.N. 79. Indeed, as one Senator pointed out, the IDEA not only "recognizes the need for early intervention," but also "represents one of the very few areas of Federal investment in this critical age group." 143 CONG. REC. S4401-04, S4408 (daily ed. May 14, 1997) (statement of Sen. Kohl); *see id.* ("I am particularly pleased that this legislation will intensify the focus on early intervention services for infants and toddlers with disabilities. As we know from the growing body of scientific evidence on brain development, the most important time to influence a child's learning capacity is in the zero to 3 age range.").

This heavy emphasis on early identification and early intervention only makes sense if it is joined with a

commitment to allow parents and educators to act on the gathered information about a child's disabilities. Section 1412(a)(10)(C)(ii) was added to the IDEA in the 1997 amendments, and yet Petitioner's reading is in considerable tension with the 1997 amendments' strong focus on the need for providing children with appropriate intervention services as quickly as possible. *See* S. REP. NO. 105-17, at 5-6 (stating the 1997 amendments were meant "to assist States in the implementation of early intervention services for infants and toddlers with disabilities and their families and support the smooth and effective transition of these children to preschool"). Many parents will now know before their child begins school that the local school district, despite its best efforts, will be unable to provide a FAPE for their child. This emphasis on early identification and intervention will not lead to the desired results if students with identified mental, emotional, or learning disabilities are then required to "fail first" in a public school in order to remain eligible for private school reimbursement. Petitioner's "fail first" policy will only frustrate the congressional goal of helping children receive assistance at the earliest possible opportunity.

D. Petitioner's Rule Is Also Strongly in Tension With The National Commitment, Embodied In The IDEA, To Effective Literacy Education.

Overall, 6.8 million children in the United States between the ages of four and seventeen have been diagnosed with at least one of the following disorders: attention-deficit-hyperactivity disorder, learning disability, mental retardation, autism, Down's syndrome, or developmental delay. Patricia N. Pastor et al., National Center for Health Statistics, Centers for Disease Control and Prevention, *Parental Reports of Emotional or Behavioral Difficulties and Mental Health Service Use Among U.S. School-Age Children, available at*

http://mentalhealth.samhsa.gov/publications/allpubs/SMA06-4195/ Chapter18.asp (last visited July 13, 2007).

Moreover, during the course of a single school year, approximately twenty percent of children have symptoms of a diagnosable clinical mental health disorder and about five percent have symptoms causing serious functional impairment. *See id.* (citation omitted). "Unfortunately, mental disorders in children are often undetected and therefore remain untreated." *Id.* (citations omitted). Unmet mental health care needs can have serious consequences for children and their families: strained social relationships, poor academic performance, and serious problems in adulthood. *See id.*

Early and effective instruction for all of these children is critical. But *amici* focus herein on the particular issues arising from a delay in proper placement for a child who is learning to read. "Since reading disability is estimated to comprise at least 80 percent of all learning disabilities, we can infer that about 3.5 percent of the school population, or slightly more than 2 million children, are receiving special education services for a reading disability." Sally Shaywitz, OVERCOMING DYSLEXIA: A NEW AND COMPLETE SCIENCE-BASED PROGRAM FOR READING PROBLEMS AT ANY LEVEL 29 (2003); *see also* LD Online, *What is a Learning Disability*, at 1, *available at* http://www.ldonline.org/ldbasics/whatisld (last visited July 13, 2007). And of those children diagnosed with mental retardation, approximately 85% have mild mental retardation and can learn to read with the right intervention. American Psychiatric Ass'n, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV-TR 43 (4th ed. 2000). Thus, the IDEA's focus on reaching children at an early age can also be understood in large part as an effort to help all of these children learn to read.

The importance of teaching all children to read cannot be overstated. It is undisputed that the ability to read is one of the primary tools necessary to succeed in our society. *See* National Research Council, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN 1 (Catherine E. Snow et al. eds., 1998); *see also* Michael Regalado et al., Building Community Systems for Young Children, *Reading and Early Literacy* 1 (2001) ("Few would argue [the point] that literacy achievement is a public policy matter of the highest priority.").

When President Bush introduced the No Child Left Behind Act of 2001 ("NCLB") he described reading as "the most basic educational skill" and posited that "the most basic obligation of any school is to teach reading." *See* Robert W. Sweet, Jr., *The Big Picture: Where We Are Nationally on the Reading Front and How We Got Here, in* THE VOICE OF EVIDENCE IN READING RESEARCH 13, 19 (Peggy McCardle & Vinita Chhabra eds., 2004). This is why one of the fundamental goals of the NCLB is for every child to achieve literacy by the end of third grade. *See* U.S. Dep't of Educ., *Executive Summary of the No Child Left Behind Act of 2001*, *available at* http://www.ed.gov/nclb/overview/intro/execsumm.html (last visited July 2, 2007).

The obvious implicit linkage between the NCLB (with its emphasis on reading skills) and the IDEA (and its early intervention philosophy) was made explicit by President Bush when he signed the Individuals with Disabilities Education Improvement Act on December 3, 2004. President Bush explained that these amendments to the IDEA were meant to "apply[] the reforms of the No Child Left Behind Act to the Individuals with Disabilities Education Improvement Act so schools are accountable for teaching every single child." Statement by President George W. Bush Upon Signing H.R. 1350, 2004 U.S.C.C.A.N. S43, S44 (Dec.

3, 2004). He stated that "[c]hildren with disabilities deserve high hopes, high expectations, and extra help" and that the 2004 IDEA amendments were meant to "ensure[] that students with disabilities will have special education teachers with the skills and training to teach special education and their subject area." *Id.* at S44. He also observed that "[s]ome students with disabilities will need intensive, individualized help." *Id.* Most tellingly, President Bush criticized the practices of the past, when students with disabilities "were too often just shuffled through the system with little expectation that they could make significant progress or succeed like their fellow classmates." *Id.* at S43-S44.

The "fail first" rule proposed by Petitioner will do exactly what President Bush criticized in his signing statement—force students with disabilities to pass through the public schools even if their public school placement is inappropriate and no progress will be made. As *amici* discuss in the next section, any rule that creates a risk of "wasting" the first critical years of a child's education while parents are forced to try out inadequate public settings risks irreparable harm. The IDEA's focus on early and effective instruction is strongly grounded in the empirical understanding that early education is the key, particularly with regard to reading. In short, the IDEA—which has many provisions meant to promote early intervention—should not be construed to require rules that hinder the appropriate placement at an early age that is necessary to teach reading to children with disabilities.

II. The Empirical Research Demonstrates That Placing Children With Disabilities Appropriately From The Beginning Is Critical.

A. Effective Literacy Training At An Early Stage Is Critical.

Children with mental, emotional, and learning disabilities—regardless of how they are classified—face tremendous difficulties in learning to read. *See* Joseph R. Jenkins & Rollanda E. O'Connor, *Early Identification and Intervention for Young Children with Reading/Learning Disabilities*, *in* LEARNING DISABILITIES SUMMIT: BUILDING A FOUNDATION FOR THE FUTURE 1 (Aug. 2001), *available at* http://www.nrcld.org/resources/ldsummit/jenkins.shtml (last visited July 2, 2007). Along with biological deficiencies and/or psychological conditions that hamper a child's intellectual, emotional, and social development, specific learning disorders often result in a failure to learn to read normally. *See* Shaywitz, OVERCOMING DYSLEXIA: A NEW AND COMPLETE SCIENCE-BASED PROGRAM FOR READING PROBLEMS AT ANY LEVEL, at 81 ("As they read, good readers activate the back of the brain and also, to some extent, the front of the brain. In contrast, dyslexic readers show a fault in the system: underactivation of neural pathways in the back of the brain. Consequently, they have initial trouble analyzing words and transforming letters into sounds, and even as they mature, they remain slow and not fluent readers"). When young children with reading difficulties are not provided with the help and support they need at the beginning of their educational careers, they often lose their motivation to learn, have less desire to practice important literacy skills, and consequently, their academic achievement suffers. *See* Marcee M. Steele, *Making the Case for Early Identification and Intervention for Young Children at Risk*

for Learning Disabilities, 32 EARLY CHILDHOOD EDUC. J. 75, 75-76 (2004).

In light of this, the message to parents, teachers, and policy makers is clear: "Children who will probably need additional support for early language and literacy development should receive it as early as possible." National Research Council, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN, at 9. Students who are not learning to read as quickly and easily as their peers generally do not "require qualitatively different instruction ... [i]nstead, they more often need application of the same principles by someone who can apply them expertly to individual children." *Id.* at 12.

Despite the need for special attention at an early age, the National Research Council found that when schools actually intervene to help children who are at the greatest risk for literacy failure, it often does not occur until as late as third grade—or when those children have already fallen behind their peers. *See id.* at 326. Given that the process of learning to read begins at the earliest stages of cognitive development, the National Research Council concluded that "deferring intervention until third or fourth grade should be avoided at all costs." *Id*; *see also* Sheldon H. Horowitz, National Center for Learning Disabilities, *Transition to Kindergarten: Policy Implications for Struggling Learners and Those Who May Be at Risk for Learning Disabilities*, at 12 (2007), *available at* http://www.ncld.org/images/studies/downloads/school-transition-policy-paper.pdf (last visited July 4, 2007) ("[t]he earlier that one intervenes with young children . . . the greater the likelihood of mitigating the potentially negative consequences of these disabilities").

Accordingly, the earlier that intervening services are provided to children with disabilities, the less likely that the impact of the disability will be felt. *See* Committee on

Integrating the Science of Early Childhood Development, FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 78-80 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000). Early intervention correlates with a strong likelihood that students with reading difficulties will establish a foundation from which to improve their literacy skills and thus significantly improve their chances of future academic success. *See, e.g.*, Steele, *Making the Case for Early Identification and Intervention for Young Children at Risk for Learning Disabilities*, at 75-76; G. Reid Lyon & Jack M. Fletcher, *How to Prevent Reading Disabilities*, at 1, 5 (2001), *available at* http://www.hoover.org/publications/ednext/3389276.html (last visited July 3, 2007) ("[e]arly intervention allows ineffectual remedial programs to be replaced with effective prevention").

B. Educators Understand The Costs Of Mistakes In Initial Placements.

It is now undisputed in the educational community that the early intervention approach embodied by the IDEA will particularly help students with reading difficulties. As one commentator has written, "[t]he general question of whether early childhood [intervention] programs can make a difference has been asked and answered in the affirmative innumerable times. This generic inquiry is no longer worthy of further investigation." FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT, at 379.

The emphasis on early intervention in the IDEA partly reflects an awareness that learning to read is a developmental process that begins in infancy and continues throughout childhood. *See* National Research Council, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN, at 43. Research has shown that children must acquire certain skills to become literate students, including (1) phonemic awareness; (2) the

ability to decode unknown words using phonics; (3) the ability to recognize a substantial number of words by sight for fluent reading; (4) the acquisition of a growing vocabulary; and (5) the utilization of reading comprehension techniques. *See* Joseph K. Torgesen, *Lessons Learned from Research on Intervention for Students Who Have Difficulty Learning to Read, in* VOICE OF EVIDENCE IN READING RESEARCH 361-62 (Peggy McCardle & Vinita Chhabra eds., 2004); *see generally* National Reading Panel, *Teaching Children to Read: An Evidence-Based Assessment of the Scientific Research Literature on Reading and Its Implications for Reading Instruction*, at 7-15 (2000).

If children can internalize these skills through comprehensive, consistent, and appropriate instruction from the very beginning of their educational development, they will "rarely stumble later on." *See* National Research Council, STARTING OUT RIGHT: A GUIDE TO PROMOTING CHILDREN'S READING SUCCESSES 145 (1999). However, they will only be able to internalize these skills if they are able to receive an appropriate placement at the earliest possible stage. Waiting years for such a placement—as Petitioner's rule could require—simply will not do.

Research also indicates that while socioeconomic status, a parent's literacy rate, and the child's rate of cognitive development all impact a child's literacy development, one of the most constant and well-known factors in determining whether children will grasp basic literacy skills is the type of learning environment in which they learn these skills. *See, e.g.*, National Research Council, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN, at 313-44; L. Bill Searcy, *Preventing Reading Difficulties Through Early Identification of Children with Special Literacy Needs, in* PEER PROJECT, at 9 (2000). Students placed in classrooms characterized by frequent interruptions, high student to teacher ratios,

unimaginative and repetitive tasks, disinterested or over-worked teachers, and/or an overall poor literacy environment are more likely to have difficulty learning to read—especially if a student has already shown signs of having a disability. Searcy, at 9 (*citing* National Research Council, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN, at 129). Children with emotional disabilities, in particular, need a "structured teaching environment, including the provision of explicit, systematic, and highly interactive direct instruction, delivered in learner-friendly, memorable ways." Mary Wagner et al., *Educating Students with Emotional Disturbances: A National Perspective on School Programs and Services*, 14 J. OF EMOTIONAL & BEHAVIORAL DISORDERS 12, 13 (2006).

Given that the type of classroom environment in which a child receives reading instruction has a definitive impact on literacy, the National Research Council concluded that in order to provide early and effective services for students with reading disabilities, schools must be able to provide these students with smaller class sizes, lower student to teacher ratios, qualified reading specialists, current and age-appropriate instructional materials, and continuous teacher training. *See* National Research Council, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN, at 327. Similarly, Joseph F. Torgesen, a noted researcher in this field, argues that there are four critical elements for establishing effective intervention programs in elementary schools: (1) the right kind and quality of instruction; (2) to be delivered with the right level of intensity and duration; (3) to the right children; (4) at the right time. *See* Joseph K. Torgesen, *Catch Them Before They Fall: Identification and Assessment to Prevent Reading Failure in Young Children, at* 3 (1998), *available at* http://www.ldonline.org/article/225?theme=print (last visited June 30, 2007). Parents who recognize that their children need these types of services

should not be forced to place their children in public schools that are unable to provide such services. Yet that is exactly what will occur if Petitioner prevails.

C. The Costs of Petitioner's Rule Will Far Outweigh The Costs Of Allowing Parents to Choose An Appropriate Private Setting For A Child Entering The Educational System, Where Necessary.

Petitioner and its *amici* devote considerable attention to the costs involved in affirming the decision below. *See, e.g.*, Pet'r Br. at 41 (discussing the "potentially enormous economic impact" of the Second Circuit's holding); Br. of the Council of the Great City Schools et al., at 20-27 (discussing costs). But as this Court has explained, the costs of private tuition reimbursement can be avoided under the IDEA when the school district makes an appropriate placement that will give free and appropriate public education. *See Carter*, 510 U.S. at 15. Moreover, Congress understood when it enacted the IDEA and its 1997 amendments that while providing services to children with disabilities may be costly, there are also enormous individual and societal costs when children do not receive the services they need at the earliest possible age. *See* 20 U.S.C. § 1431(a) (setting forth findings on the "urgent and substantial need" to improve early intervention services and to reduce the "costs to our society, including our Nation's schools, by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age"); H.R. REP. NO. 105-95, at 47 (same)

In other words, providing appropriate services to children at an early age can save money in the future by preventing the need for more intensive—and more expensive—services. *See* H.R. REP. NO. 105-95, at 115, *as reprinted in* 1997 U.S.C.C.A.N., at [illegible] ("infants and toddlers with disabilities whose families receive early intervention services often need

less intensive services when they reach school age."). Indeed, it is fair to say that one of the illuminating principles underlying the Act is that "[i]f we can get young children the services they need early on, we may prevent a need for more drastic intervention later on." 147 CONG. REC. H906-05, H907 (daily ed. March 14, 2001) (statement of Rep. Hooley advocating full funding for the IDEA).

1. The individual costs to the child of failing to provide an appropriate initial placement are high.

Petitioner's *amici* contend that subjecting children to a "try-out" period in a public school placement that parents believe is inappropriate will nonetheless be a positive good because "[e]veryone, including the hearing officers and courts asked to adjudicate disputes regarding the efficacy of the placement, will benefit from the opportunity to assess the placement in practice, rather than on paper." Br. of the Council of the Great City Schools et al., at 15-16. But Petitioner's *amici* fail to recognize that "everyone" does not benefit from a period of inappropriate placement. Notably left out from the list of those who benefit is the child, who would be required to suffer through a placement later deemed inappropriate. Indeed, it is those children who are the subject of this case. Such children will most assuredly not "benefit from the opportunity" and may in fact suffer lasting harm.

These observations are strongly supported by scholarly research demonstrating that while tuition reimbursement may be costly, failing to provide an appropriate initial placement is more costly to children and to society in general. The consequences of failing to attain basic literary skills are significant for children. *See* Torgesen, *Catch Them Before They Fall: Identification and Assessment to Prevent Reading Failure in Young Children*, *available at* http://www.ldonline.org/article/225?theme=print (last visited June 30, 2007). Children who do not develop these core literacy skills will

have "reduced opportunities for vocabulary growth," "missed opportunities for development of reading comprehension strategies," and "less actual practice in reading than other children receive." *Id.* Indeed, failure to achieve competency in these core literacy skills is one of the primary reasons that students are "held back" in school, assigned to special education classes, or provided with other remedial services. *See, e.g.,* Learning First Alliance, *Every Child Reading: An Action Plan of the LEARNING FIRST ALLIANCE*, at 1 (1998), *available at* http://www.learningfirst.org/publications/reading (last visited July 1, 2007.). It is also well established that "[c]hildren who are poor readers at the end of first grade almost never acquire average-level reading skills by the end of elementary school." Joseph K. Torgesen, *Preventing Early Reading Failure—and its Devastating Downward Spiral: The Evidence for Early Intervention*, AMERICAN EDUCATOR (Fall 2004), *at* http://www.aft.org/pubs-reports/american_educator/issues/fall04/reading.htm, at 1 (last visited July 17, 2007) (citing several longitudinal studies supporting this conclusion).

Because every child is unique, it is impossible to provide a standardized learning curriculum that will adequately meet the literacy needs of all students. However, there are basic skills that all students must be taught in order to become proficient readers as they transition from kindergarten through third grade. *See* National Research Council, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN, at 79-84. For example, learning to read in kindergarten and first grade is generally defined by a child's grasp of phonological skills, or the ability to "know their letters," hear and distinguish individual letter sounds, and match letter sounds to printed text. *Id.* at 80-81. Upon completion of second grade, students should be able to comprehend grade-appropriate fiction and non-fiction text and "[s]how evidence of [an] expanding language repertory." *Id.* at 82. Finally, by

third grade, students should be able to use "letter-sound correspondence knowledge and structural analysis to decode words," discuss themes and messages in grade-appropriate text, and read aloud with fluency and comprehension. *Id.* at 83. Failing to succeed at any of these levels, however, will inevitably cause students to fall behind in their academic achievement. *See id.* at 4. As such, early intervention for students in need of reading assistance is critical to preventing the problems that plague students who did not acquire these core literacy skills at the same rates as their peers.

The failure to learn to read may also lead to additional learning disorders or psychological conditions that will further hamper the child's intellectual, emotional, and social development. Such a child may suffer multiple years of early failure since early schooling is centered around reading skills. Indeed, research shows that by the end of first grade, children struggling to read begin to feel less positive about themselves. *See Learning Disabilities and Early Intervention Strategies: How to Reform the Special Education Referral and Identification Process: Hearing Before the H. Subcomm. on Educ. Reform of the H. Comm. of Educ. and the Workforce*, 107th Cong., at 68 (2002) (statement of Robert Pasternack, former Assistant Sec'y of Special Educ. & Rehab. Servs., U.S. Dep't of Educ.) [Hereinafter, *Hearing*]. By the third grade, these students will often resist efforts to learn because "they no longer have the motivation [not] to look stupid." *Id.* at 33 (statement of G. Reid Lyon, Research Psychologist and Chief of Child Development and Behavior Branch, National Institute of Child Health and Human Development). From that point on, as students are introduced to content from social science, history, and literature, their inability to read will effectively hamper the remainder of their education. *See id.* Such children will likely experience further decline in self-esteem and motivation, conclude they will never learn at the rate of

other students, and withdraw into isolation. *See id.* at 68 (statement of Mr. Pasternack).

Accordingly, failing to properly support students requiring an individualized educational plan may cause mental, emotional, or learning disabilities to snowball. University of Michigan Health Systems, *What are Learning Disabilities (LD)?*, *at* http://www.med.umich.edu/1libr/yourchild/ld.htm (last visited July 17, 2007). Though it is difficult to distill a definitive theory of causation from the coexistence of certain learning disorders, the scientific literature on comorbidities suggests that failing to properly treat developmental disorders increases the likelihood that other learning disorders will emerge. It is well-documented that comorbidity of developmental disorders tends to be the rule, and not the exception. *See generally* Deborah Dewey, *Comorbidity of Developmental Disorders*, *available at* http://play.psych.mun.ca/~dhart/clinical/newsletter/comorbidity.html (last visited July 17, 2007). For example, the general link between attention-deficit/hyperactivity disorder and learning disorders is well-established. *See generally* Jeanette Wasserstein & Martha Denkla, *Learning Disabilities and Attention Deficit/Hyperactivity Disorder in Adults: Overlap with Executive Functioning*, *in* ATTENTION-DEFICIT DISORDERS AND COMORBIDITIES IN CHILDREN, ADOLESCENTS, AND ADULTS (Thomas Brown ed., forthcoming 2008). Thus, to the extent that schools are failing to properly place and educate children with mental, emotional, and learning disorders, there seems to be a natural risk of making those disorders worse while also contributing to related psychological disorders.

Moreover, the law is replete with compelling anecdotes that illustrate how the failure to properly address a child's learning disorders may exacerbate whatever learning disabilities previously existed, and therefore stymie that

child's overall educational progress. For example, consider Alex Keita, an autistic child whose parents successfully challenged the IEP developed by his school district. *See Diatta v. District of Columbia*, 319 F. Supp. 2d 57 (D.D.C. 2004). Experts found that the school district's failure to recommend the right kind of placement had "exacerbated Alex's condition and interfering behaviors; that Alex had made no progress in the last three years; and that the longer that Alex [was] denied an appropriate education program the worse his behaviors [would] become, increasing the likelihood that he [would] need to be placed at a residential treatment facility." *Id.* at 60. The court concurred that Alex's condition had been "exacerbated" by the school's district's failure to make a proper placement and lamented about the degree of damage that had been done. *Id.* at 67. It concluded that "[f]or the foreseeable future the majority of Alex's education will be remedial, in that educators, aides and his family will have to correct four years of mis-education before Alex is fully brought up to speed and operating at an educational level commensurate with his age and abilities as a disabled child." *Id.* at 66.

In short, the costs to children in failing to provide them with an appropriate initial placement are simply too high.

2. The societal costs of failing to provide an appropriate initial placement are high.

The indirect costs of failure, in turn, are major. These costs may not be borne exclusively by the school districts, but they will surely be borne by society as a whole. Beyond the harm caused to the lives of the individual children who are made to endure an inappropriate placement that persists while the legal process under the IDEA plays out, broader societal costs are also inherent in a regime that makes children wait for the educational support that they need.

For example, inappropriate placement for children with disabilities may be related to an increased risk of school dropout. *See* National Council on Disability, *The Well Being of Our Nation: An Inter-Generational Vision of Effective Mental Health Services and Supports* 18-19, 28 (Sept. 16, 2002), *available at* http://www.ncd.gov/newsroom/publications/2002/pdf/mentalhealth.pdf [hereinafter *Well Being*]. Indeed, the dropout rate for children with learning disabilities is nearly forty percent, which is 1.5 times the national average. *See* American Psychiatric Ass'n, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV-TR 50 (4th ed. 2000). When a child's disabilities are not appropriately treated, he or she is more likely to fail, become ashamed or frustrated, and end up teased or ostracized by others. As this occurs, the child's behavior will often deteriorate, making each school day a "cruel test" and leading the child to hate school, and possibly drop out altogether. Stanley J. Antonoff, *Juvenile Justice, Dyslexia, and Other Learning Disabilities*, *in* THE SECOND CONFERENCE ON JUVENILE JUSTICE, DYSLEXIA AND OTHER LEARNING DISABILITIES 9 (Stanley J. Antonoff ed., 2000); *see also Hearing* at 7, 68. Though these tendencies may arguably exist whether or not a disability is properly treated, inappropriate treatment exacerbates the risks.

The implications of inappropriate placement also extend well beyond the affected individuals and raise distinct policy concerns related to the social costs of inappropriate placement. In particular, the failure to provide an appropriate education to children with disabilities may "contribute to avoidable behaviors that result in delinquency or an increased likelihood of referral to the juvenile justice system." National Council on Disability, *Addressing the Needs of Youth with Disabilities in the Juvenile Justice System: The Current Status of Evidence-Based Research* 26 (May 1, 2003), *available at* http://www.ncd.gov/newsroom/

publications/pdf/juvenille.pdf. Indeed, though the issue of causation is complicated, studies have consistently found that the rate of mental and emotional disabilities is higher among the juvenile justice population than among the general population. *See Addressing the Needs*, at 15; *Well Being*, at 30; Sue Burrell & Loren Warboys, Office of Juvenile Justice and Delinquency Prevention, *Special Education and the Juvenile Justice System* (2000), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/179359.pdf [hereinafter Burrell & Warboys, *Special Education*]; U.S. Dep't of Educ., *Twenty-First Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* II-2 (1999).

Among the possible explanations, one that is commonly cited is the "school failure theory," in which a student's experience of his or her disability may be the source of difficulties, frustration, and failure in school, which in turn may lead to criminal behavior. *Addressing the Needs*, at 55; *Well Being*, at 32-33. This possibility is amplified when schools fail to provide the required services under the IDEA; in such instances, the child may instead be treated or labeled as a "discipline problem" and, hence, create a self-fulfilling prophecy. *Well Being*, at 28, 32; Antonoff, *Juvenile Justice, Dyslexia, and Other Learning Disabilities in* THE SECOND CONFERENCE ON JUVENILE JUSTICE, DYSLEXIA AND OTHER LEARNING DISABILITIES 4–5. In sum, without appropriate intervention, students whose behavior and disabilities ought to be addressed in school sometimes find their needs being addressed through the juvenile justice system instead. *See Well Being*, at 32-33. Conversely, ensuring that disability-related needs are appropriately treated through proper educational services may play a significant role in reducing juvenile delinquency. *See generally* Burrell & Warboys, *Special Education*. But one of the keys is assuring an

appropriate *early* education in an appropriate *initial* placement.

CONCLUSION

For the reasons stated above, *amici* urge this Court to affirm the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

PAUL M. SMITH*
HARRY SANDICK
SANDI J. TOLL
JESSICA RING AMUNSON
BRADLEY A. AREHEART
JENNER & BLOCK LLP
601 Thirteenth Street, NW
Washington, DC 20005
(202) 639-6000

*Counsel of Record

Attorneys for *Amici Curiae*

Dated: July 18, 2007